NO. 88-74

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

THE INGERSOLL MILLING MACHINE COMPANY, AND WALDRICH SIEGEN WERKZEUGEMASCHINEN GmbH,
Petitioners,

v.

HYDRIL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT HYDRIL COMPANY'S BRIEF IN OPPOSITION

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RESTATED QUESTION PRESENTED FOR REVIEW

Did the District Court and the Court of Appeals apply the proper standards under Rule 56 of the Federal Rules of Civil Procedure in granting Respondent's Motion for Summary Judgment?

RULE 28.1 LIST

Hydril Company has no parent companies, affiliates or subsidiaries (other than wholly-owned subsidiaries).

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Respondent Hydril Company ("Hydril") respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the fifth circuit's opinion in this case. Neither the appellate court's nor the district court's decisions were reported. Both are reprinted in the Appendix to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners have sought review in this Court of the summary judgment granted Respondent Hydril Company, plaintiff in the district court, on Hydril's state law claim that Petitioners breached the refund provisions of the Purchase Order contracts between Hydril and Petitioners. The district court's opinion granting summary judgment is unpublished, as is the decision of the fifth circuit affirming the district court judgment.

In moving for summary judgment, Hydril relied on no testimony of its own witnesses; instead, it relied *exclusively* on the unambiguous terms of the contracts at issue and the admissions of Petitioners' employees whom Petitioners designated to testify in their behalf on the key issues in the lawsuit pursuant to Rule 30(b)(6), F. R. Civ. P. *Every* fact recited in this Statement of the Case, as in Hydril's motion for summary judgment, comes directly from the contracts at issue or from the mouths or the pens of Petitioners' witnesses. Petitioners' Statement of the Case demonstrates a remarkable lack of candor about these admissions and undisputed facts. As shown below, these admissions by Petitioners' representatives were devastating to Petitioners' effort to show a genuine issue of material fact to forestall summary judgment.[1]

Hydril's contract claim sought to enforce the remedy expressly provided for in the Hydril Purchase Orders,

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1. Among those designated, whose testimony on behalf of Petitioners supports Hydril's Statement of the Case, are Ron Enfield, Project Manager for Petitioners on the "Hydril project"; Tom Birchall, Vice President and General Manager of Petitioner Ingersoll at the time of the transaction; Helmut Belz, President and Chief Executive Officer of the Petitioner WASI; and Dieter Feisel, Commercial Director of WASI.

that Petitioners refund money which Hydril had advanced on those Purchase Orders because certain contingency items were never resolved in writing to the parties' satisfaction as required by the terms of the Purchase Orders.

On granting Hydril summary judgment, the district court ruled on the plain terms of the contract, noting that Hydril's contract claim was simple because (1) no party claimed that the provisions of the Purchase Orders were ambiguous; (2) it was clear the Purchase Orders required some type of writing to effectuate a resolution of the contingency items; and (3) the Purchase Orders prescribed the exclusive means of resolving the contingencies. Because these contingencies were not resolved in the manner dictated by the Purchase Order contracts, summary judgment for Hydril was proper.

1. The History of the Machines.

The two Hydril Purchase Orders that are at the heart of this lawsuit concerned a combination of goods and services to be supplied by Waldrich Siegen Werkzeugemaschinen GmbH ("WASI"). Ingersoll and WASI, sister companies that manufacture and sell machine tools, accepted the Purchase Orders from Hydril on March 11, 1982. Ingersoll guaranteed the performance of the Purchase Orders by WASI and acted as sales agent for WASI.

In the Purchase Orders, Hydril conditionally ordered two complete machining systems (including two computer controlled vertical/horizontal milling machines commonly referred to as "V/H machines") which were supposed to enable Hydril to manufacture many different sizes of blowout preventer parts. Enfield 85-86, 112-113,

117.[2] However, the particular V/H machines that were specified in the Purchase Orders were not originally designed for Hydril's needs. Petitioners had designed and begun construction of the machines in August 1981 (long before Hydril was approached about them) for NL Industries, who later refused them. Belz, 47-49; Feisel, 42; Chalmers, 39; Palmer, 9, 12-15; Birchall, 97-98, 100-101.

Stuck with two expensive machine tools designed for a "purchaser" who did not want them, Petitioners sought to unload the machines by selling them to Hydril. Petitioners submitted a written proposal to Hydril in February 1982. Belz, 57-67; RE 12.

2. The Contracts Require Resolution of the Contingency Items in Writing.

Petitioners' proposal did not include all the necessary equipment, engineering, services, and criteria concerning the efficiency of the V/H machines to put the machines into use for Hydril's applications. Without them, Hydril could not be certain that the machines could effectively and efficiently manufacture blowout preventers because the machine had never been used for that purpose. Hydril, therefore, submitted Purchase Orders that extensively amended Petitioners' proposal and specifically identified numerous "contingencies" to be resolved to the satisfaction of both parties by written change orders.

These contingencies included the necessary tooling, fixturing, computer programming, manufacturing meth-

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2. Deposition citations are found among Exhibits to Hydril's Motion for Partial Summary Judgment, which are bound in separate volumes in the record on appeal. References to Record Excerpts filed with the court of appeals are denoted "RE."

ods, performance standards, service, and installation at a mutually agreeable price to be determined, all required in order to put the machines to work making blowout preventers. The Purchase Orders were "conditioned" on the parties agreeing to purchase order change notices formally released by Hydril and accepted by Petitioners resolving all of these contingencies. Petitioners knew when they accepted Hydril's Purchase Orders that Hydril's only possible interest in the V/H machines was as part of a "turnkey" package. They also knew that numerous contingencies had to be resolved and agreed on to complete the "turnkey" system. Birchall, 138-139, 169, 425-426; Enfield, 112-113, 408.

The Purchase Order contracts explicitly provide that failure to resolve the contingency items in written amended purchase orders to the satisfaction of all parties would render the contracts null and void, with all advances by Hydril against the orders to be refunded in full. Enfield 164, 175.[3] The exact Purchase Order provisions on which the motion for summary judgment and the district and appellate courts' judgments are predicated read:

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3. Petitioners were not happy about this provision; when the Hydril Purchase Orders were presented to Mr. Birchall on March 11, 1982, he objected to Hydril's termination and refund rights. Birchall, 404-405. However, Hydril insisted that Petitioners accept this risk because Hydril had no assurance that either the performance or ultimate price of the systems could be agreed on. Birchall, 401-402, 404-405. Anxious to sell these machines which NL had earlier rejected and in which WASI had a substantial investment because WASI had begun their construction at Ingersoll's premature direction, Birchall agreed to the Purchase Orders accepting all their terms, including the termination provision, for Petitioners. Birchall, 76-77, 175-176, 401-402, 404-405; Belz, 70-71, 81-82; Feisel, 64.

> FAILURE TO RESOLVE THE LISTED CONTINGENCY ITEMS* IN A MANNER SATISFACTORY TO BOTH PARTIES WILL RENDER THIS CONTRACT NULL AND VOID, WITH ALL PREVIOUS MONETARY PAYMENTS MADE BY HYDRIL TO BE IMMEDIATELY REFUNDED BY INGERSOLL.

Exhibits B and C, p. 1, to Hydril's Motion for Partial Summary Judgment.

> SATISFACTORY RESOLUTION OF CONTINTINGENCY ITEMS WILL BE INCORPORATED INTO THIS CONTRACT BY MEANS OF FORMAL PURCHASE ORDER CHANGE NOTICES WHICH WILL REQUIRE FORMAL RELEASE AND ACKNOWLEDGEMENT ACCEPTANCE BY INGERSOLL.

Exhibits B and C, p. 11, to Hydril's Motion for Partial Summary Judgment. The Purchase Orders listed at least 22 or 23 individual contingency items, including such basic items as pricing, fixturing, design criteria, and performance criteria. Enfield, 492.

Petitioners indisputably knew, understood, and admit that failure to resolve the contingency items in subsequent formal, written amendments or change orders, accepted and acknowledged by all, rendered the original Purchase Orders null and void and entitled Hydril to a refund. Birchall, 175-176, 183, 232-233, 349-350; Enfield, 164, 175, 231-233. In fact, Petitioners' own Hydril project manager, Ron Enfield, designated by Petitioners to testify concerning the resolution of the contingencies in the Hydril Purchase Orders, expressed repeatedly and unequivocally the understanding of all parties that the contingencies would be resolved by written amendments signed and accepted by all parties. Enfield, 164, 175, 231.

Mr. Birchall (who negotiated the contract for Petitioners) also testified that Petitioners had agreed to be bound by that provision and that the contingency items should be reduced to writing. Birchall, 294. It is undisputed by all parties that no resolution of the contingency items was ever reduced to formal change orders which were accepted and acknowledged by the parties. Birchall, 272-273, 283-284, 294-295. Mr. Birchall admitted, as Petitioners' designated representative, that he knew that if the contingency items were not resolved to the satisfaction of Petitioners and Hydril, then Hydril was entitled to have all of the money it paid refunded to it. Birchall, 232-233.

3. The Attempts to Resolve the Contingencies in Writing Fail.

After the conditional Hydril Purchase Orders were executed, the parties tried to reach a mutually satisfactory resolution of the numerous contingency items for seven months. Petitioners' Project Manager Ron Enfield, designated to testify about efforts to resolve contingency items, admitted Hydril worked "in good faith" on the project, noting that Hydril expended fully 150 man-weeks in an effort to satisfactorily resolve the contingency items, even though Hydril, as the proposed purchaser, had no duty to participate in the design of the machine system Petitioners were trying to sell. Enfield, 166, 168-169, 227.

As part of the effort to resolve the contingency items, the parties met in a series of meetings in June 1982 and drafted a memorandum dated June 25, 1982 reflecting certain cost and scheduling matters. Petitioners contended in the district court that this memorandum was a resolu-

tion of the contingency items. The district court held that this claim is belied by the plain language of the document, which expressly states that it is merely a "cost and schedule" plan (and says nothing about the many contingency items enumerated in the Purchase Orders) that still required formal written amendments to the Purchase Orders:

> The above agreements represent basis of cost and schedule positions to be incorporated into specific contract language and subsequently formalized by revision to Hydril P.O. #26007 and #26008. These actions and formal order authorization are subject to the review and approval of Hydril MPD and corporate office representatives.

RE 24; Petition Appendix at 5a.

Petitioners' Statement of the Case ignores the fact that their own Project Manager, Ron Enfield, whom Petitioners designated to testify about resolution of the contingency items, admitted that the June 25th memorandum did not resolve the contingencies, and that Petitioners later withdrew the very proposals for resolving the contingency items that were under consideration on June 25th. Enfield, 147-48, 419; Utsch, 54, 58, 62-63; Vol. III, Ex. 59 Appendix to Defendants' Memorandum in Opposition to Hydril's Summary Judgment Motion.

In July 1982, Hydril generated and transmitted written formal purchase order change notices setting forth Hydril's proposals for resolving the contingency items. Petitioners admit that they refused to sign or accept this effort by Hydril to resolve the contingency items in accordance with the Purchase Orders' requirements. Birchall, 272-273, 283-284, 457. Petitioners readily admit they never

executed any formal purchase order change notices embodying a mutually satisfactory resolution of the contingency items, and no resolution of the contingency items was ever reached. Enfield, 163-169; Birchall, 272-273; Belz, 152, 216-217. There is no evidence that Petitioners even proposed any change order notices of their own incorporating the supposed resolution of the contingency items they claimed occurred.

4. The Smoking Gun.

Petitioners' most revealing admission, specifically noted by District Judge Hughes in his Memorandum, is completely ignored in Petitioners' Brief. On September 20, 1982, concerned about the lack of agreement concerning the contingencies on the now long overdue project, Mr. Birchall, the Ingersoll Vice-President responsible for the Hydril project, Mr. Feisel, the WASI Commercial Director responsible for the project, and Mr. Enfield, the Project Manager, discussed the effect of the inability of the parties to agree on a resolution of the contingency items. Feisel summarized the situation in a memorandum he sent to WASI President Belz, Birchall, Enfield, and WASI engineers working on the project.

The admissions of this "smoking gun" memo totally belie the position Petitioners took in opposing summary judgment. It reads:

> Although a number of items could get clarified during the last week's meeting, like times, fixturing methods, we did not achieve our main objective to get the final contract signed.
>
> . . .

> We believe the proper analysis of the total situation is as follows:
>
> . . .
>
> D. For two reasons Hydril is in a strong bargaining position of which they are aware:
>
> . . .
>
> 2. *Their contractual situation is such that they can get all their advance payments back in case they cancel the whole project.*

(Emphasis added). RE 33; Feisel, 211-212; Birchall, 598-599; Belz, 239.

Mr. Feisel was prescient. In late October, after eight months of negotiations, with the contingencies still not resolved and the project way behind schedule, Hydril exercised its contract right to terminate the Purchase Orders and receive a refund of its advances. Belz, 216-18; Enfield, 448; RE 3. Petitioners refused to refund Hydril's advances, notwithstanding their failure to deliver a single screw to Hydril, much less a complete manufacturing system. Belz, 209-210; Birchall, 269.

5. The Decisions Below.

United States District Judge Lynn Hughes properly granted Hydril's motion for summary judgment because there is no genuine issue of material fact concerning any issue. The district court ruled that Hydril was entitled to summary judgment on its contract claim because:

1) The provisions of the Hydril Purchase Orders at issue are unambiguous, as all parties admit;

2) The key contract terms required resolution of the contingency items in writing;

3) The clear, undisputed evidence shows that the contingency items were never resolved in writing; and

4) The remedy the contract provided Hydril was entitled to was a refund of its advance payments.

The district court's ruling is supported by not only the unambiguous terms of the Purchase Orders, but also the undisputed facts *admitted* by Petitioners' designated representatives in discovery. The testimony that the district court had before it was not only just unrefuted admissions by Petitioners' own witnesses, but also testimony that bound the Petitioners unequivocally because the witnesses were designated to speak for and bind Petitioners pursuant to Rule 30(b)(6).

The fifth circuit panel (Judges Thornberry, Gee, and Politz), after its own "thorough review of the record," affirmed *per curiam,* in an unpublished opinion.

REASONS FOR DENYING THE PETITION

I.

The Unpublished Unanimous Decisions of the Court of Appeals and the District Court Demonstrate No Departure from the Well-Settled Law Pertinent to Summary Judgment Motions in Contract Cases.

This case is utterly unworthy of review by this Court. Not only are the decisions of the district court and the court of appeals correct and without any apparent or real conflict with the decisions of this Court, this case involves only state law issues of contract interpretation and a pedestrian application of Rule 56. These are not issues that now require this Court's attention.

The district court ruled in an unpublished opinion that based upon (1) the plain language of the contract and (2) the sworn admissions of Petitioners' own witnesses that Petitioners chose to testify in their behalf under Rule 30(b)(6) on the key issues, there was no genuine issue of material fact regarding the interpretation of the contract at issue. A unanimous fifth circuit panel, after its own "thorough review of the record," affirmed *per curiam* in an opinion that was unpublished under Fifth Circuit Local Rule 47.5 that provides for opinions not to be published when they "have no precedential value and merely decide particular cases on the basis of well-settled principles of law." Even if both courts misapplied the law to the facts, it is difficult to see how their unpublished decisions deviate from the well-defined standards for summary judgment on which this Court has already written three times in the last two years so as to merit review in this Court. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 222 (1986). There is simply *nothing* in either opinion below that reflects any misunderstanding of Rule 56 or conflicts with this Court's interpretation of that rule. The opinions turn entirely on the unique facts of this case.

II.

The Court of Appeals and the District Court Properly Applied Rule 56 and the Substantive Texas Law of Contracts.

In an attempt to find a certiorari-worthy issue, Petitioners have invented a non-existent "requirement" that they say the opinions of the courts below failed to meet.

Petitioners say that the district court and the court of appeals erred in failing to write out in their opinions the evidence or absence of evidence presented by Petitioners and explain why it does not produce a genuine issue of material fact.

This claim is wrong in two respects. The first reason is there simply is no requirement imposed either by the text of Rule 56 or this Court's interpretation of it that a district court must mechanically recite each piece of evidence offered by the non-moving party and write out its explanation for why that evidence is irrelevant, immaterial, or insufficient to raise a *genuine* issue of fact. There is simply no practical need for this Court to create such a requirement. While imposing such an onerous burden on district courts might ease the task of the courts of appeals, it is likely to deter district courts from granting summary judgments in all but the most brutally simple cases, and is unlikely to forward Rule 56's role as an integral part of the Federal Rules "to secure the just, speedy and inexpensive determination of every action." F. R. Civ. P. 1; *Celotex Corp. v. Catrett*, 477 U.S. at 327. For this reason perhaps, this Court has already held that upon granting a motion for summary judgment, "[t]here is no requirement that the trial judge make findings of fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250. Instead, this Court has said, the duty of a district court on a motion for summary judgment is to determine

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52.

The second reason that Petitioners' criticism of the district court's opinion is without merit is that the district court's opinion (adopted by the fifth circuit after its own "thorough review of the record") *did* articulate the reasons that as a matter of law Hydril must prevail on its contract claim. It is important to recall that under Texas law, the sole issue on which summary judgment was granted, the interpretation of an unambiguous contract, was an issue of law for the court to decide:

> It is elementary that if there is no ambiguity, the construction of the written instrument is a question of law for the Court. *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193 (Tex. 1962). It is the general rule of the law of contracts that where an unambiguous writing has been entered into between the parties, the Courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls. *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617, 620 (1954). See generally: 3 Williston on Contracts § 610 (1936); Restatement of the Law of Contracts § 230 (1932).

City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 518 (Tex. 1968). In short, the interpretation of a contract unambiguous on its face is an issue of law, not fact, and thus ideally suited to summary adjudication under Rule 56.

As the district court noted, "nobody argues that either of the two purchase order provisions [at issue] is ambiguous." Petitioners' Appendix, p. 4a. Contrary to Petitioners' claim that a genuine issue of fact existed regard-

ing the intent of the parties (Petition, p. 12), this was not an issue in the district court because the contract is unambiguous. The district court ruled that the resolution of Hydril's contract claim was simple because (1) no party contended that the provisions of the purchase order contracts were ambiguous (2) "[i]t is clear that some kind of writing was required to effectuate a resolution of the contingency item," and (3) the page 11 provision prescribed the exclusive means of resolving the contingencies.

What Petitioners apparently object to is that the district court did not stop there, but went on to note that the admissions of Petitioners' own witnesses whom Petitioners designated to testify on these matters were completely in accord with the plain terms of the contract—that Hydril would be refunded its money if the contingency items were not resolved in writing. Petitioners seem to say that the district court having mentioned *some* evidence aside from the contract itself, it erred in failing to recite *all* the evidence and explain its immateriality or insufficiency. That is not, and should not be, the law.

But even if it were, the five pieces of evidence Petitioners claim the district court "ignored" (Petition, p. 13) are insufficient to forestall summary judgment on the contract interpretation issue because they are (1) not even germane to the interpretation of a contract unambiguous on its face under the legal standard the district court was bound to apply; (2) even if germane to the interpretation of the contract, insufficient to raise a *genuine* issue of material fact; (3) unsupported by the record; and (4) insufficient to overcome the admissions of Petitioners' own designated representatives that Hydril got its money back if the contingency items were not

resolved in writing to the satisfaction of both parties as required under the contract.

Similarly, the second alleged "genuine issue" Petitioners claim the district court "ignored," whether Petitioners were "excused from signing Hydril's change orders" (Petition, p. 14), is not an issue in the case at all. Rather, it is Petitioners' belated attempt to raise an affirmative defense of bad faith by Hydril that Petitioners never pled in the district court. Affirmative defenses must be pled, and may not be raised for the first time on a motion for summary judgment or on appeal. F. R. Civ. P. 8(c); *Gulf Union Industries, Inc. v. Formation Security, Inc.*, 842 F.2d 762, 765 (5th Cir. 1988); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1307 (5th Cir. 1987), *cert. denied*, ____U.S.____, 108 S. Ct. 1026 (1988).

The only issue before the district court was whether Petitioners breached the unambiguous contract which provided that failure to resolve the contingencies in written change orders accepted by both parties entitled Hydril to a refund of its money. The issue of fact Petitioners tried to raise to defeat summary judgment in the district court and the court of appeals was *not* that they were "excused" from the obligation to return Hydril's money because Hydril in bad faith refused to agree to resolve the contingency items (as they suggest here), but rather that Hydril *did* agree to a resolution of them in the June 25th memorandum. That dog having failed to hunt in the district and appellate courts for the reasons explained by the district court (Petition Appendix at 5a), Petitioners now ask for review in this Court on the basis that the lower courts "ignored" a defense of bad faith that Petitioners failed to plead.

Of the evidence Petitioners point to in support of this belated "defense" (Petition, pp. 14-15), Points 1-4 were addressed by the district court and conclusively rebutted by (1) the fact the June 25 memorandum explicitly stated that it did not constitute the change orders required by the contract and (2) the admissions by Petitioners' own designated representatives that the June 25 memorandum did not resolve the contingency items as required by the contract (*see* p. 8, *supra;* Petitioners' Appendix at 4a-5a). Point 5 ignores the undisputed evidence that Petitioners never accepted the change orders Hydril proposed, and in fact Petitioners admit they abandoned the very proposals for resolving the contingency items that were on the table at the time of the June 25th memorandum. *See* p. 8, *supra.* Point 6, that Petitioners spent money, is simply irrelevant. Points 7-9 are plain misstatements of the undisputed evidence and ignore the unqualified admissions of Petitioners' designated witnesses that the contingency items were never resolved as required under the contract. *See* pp. 8-9, *supra.* Again, the district court and appellate court found that the contractual language was unambiguous and construed the meaning of the contract as a matter of law.

In sum, the "evidence" Petitioners recite offers no more than a scintilla of support for their unpleaded defense. That is not enough.

> As *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, 391 U.S. at 288-289. If the evidence is merely colorable,

> *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*), or is not significantly probative, *Cities Service*, *supra* at 290, summary judgment may be granted.

Anderson, 477 U.S. at 249-50. When the district court and the court of appeals matched Petitioners' proferred evidence against the unambiguous terms of the contract, the sworn admissions of Petitioners' own designated witnesses that the contingency items were not resolved and that Hydril was entitled to a refund if the resolution of the contingency items were not agreed in written change orders accepted by both parties, and the smoking gun document revealing that Petitioners' own executives knew Hydril was entitled to a refund, they properly concluded that the evidence was "so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252.

III.

The District and Appellate Courts Have Not Denied Petitioners of Their Right to a Trial by Jury.

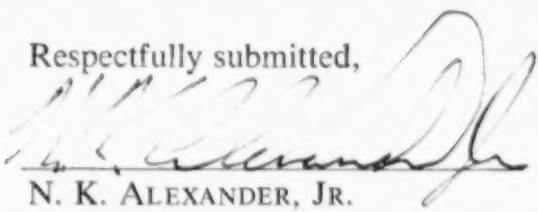
A properly granted summary judgment does not deprive a party of their right to a jury trial. Summary judgment is proper only when there is no genuine issue of material fact, i.e., when there is nothing to be decided by a jury. Petitioners' attempt to bolster their argument by appeals to their right to a jury trial fails.

CONCLUSION

There are no special or important reasons for granting the Petition in this case. The unpublished opinions of the district court and the court of appeals demonstrate no

deviation from the standards for granting motions for summary judgment set out in Rule 56 and the interpretations of that rule by this Court. The Court has recently addressed the standards to be applied under Rule 56, and this case provides no opportunity to further enlighten jurisprudence in this area. The Petition not only fails to meet the Supreme Court Rule 17 standard of showing that the decision of the court of appeals "has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," there must be few court of appeals' decisions less worthy of certiorari than this unpublished *per curiam* opinion in a state law diversity jurisdiction case. Accordingly, Respondent Hydril Company requests that the Petition for Writ of Certiorari be denied, and that all costs be taxed against Petitioners.

Respectfully submitted,



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